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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

Luther Craig Smith, Petitioner

vs.

FCX, Inc., Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Counsel of Record:

Donna Keene Holt
2214 Devine Street
Columbia, S. C. 29205
(803) 252-7530

Additional Counsel:

Daniel Holt Shine
205 West Hampton Street
Dillon, S. C. 29536
(803) 774-2400

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's determination that the Plaintiff was a "statutory employee" within the meaning of the South Carolina Workmans Compensation Act as a matter of law when the evidence was undisputed that the Defendant FCX, Inc.--a company engaged in the business of buying, selling and storing grain--did not have the capacity to perform electrical installations and repairs with its own employees as a part of the normal operation of its own trade or business; and, further, when the evidence presented and permissable inferences to be drawn therefrom could lead to differing conclusions as to whether the grain dryer being

repaired by Smith & Sons electricians on the day of the explosion was a piece of equipment essential to the Defendant's ability to engage in the business of buying, selling and storing grain?

2. Did the Court of Appeals err in denying the Appellant's Motion to Certify a Question of State Law to the South Carolina Supreme Court when it became apparant that the South Carolina District Courts were developing a "controlling factor" criterion for determining the issue of statutory employment that is contrary to a consistent interpretation of state law and in direct conflict with existing South Carolina Supreme Court decisions; and, further, when the erroneous criterion being developed did

not become authority on this issue until long after this appeal was underway?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 744 F.2d 1378, and is reprinted as Appendix A, page 1a. The judgment of the United States District Court for South Carolina is unreported and is reprinted as Appendix B, Page 8a.

JURISDICTION

The order sought to be reviewed was entered by the Court of Appeals on October 2, 1984. A timely petition for rehearing was denied on November 23, 1984 (Appendix C, Page 35a). Mr. Chief Justice Warren E. Burger entered an order extending the time for the filing of this petition to and including March 23, 1985. The jurisdiction of this court is invoked under the provisions of 28 USC § 1254(1).

STATUTES INVOLVED

S. C. Code §§ 42-1-400, 42-1-540 (1976) are the statutes involved in this case. (Appendix D, Page 36a).

STATEMENT OF THE CASE

The Appellant, Luther Craig Smith, filed this action in the United States District Court for South Carolina, Florence Division, on February 2, 1982, based on diversity jurisdiction. The Plaintiff sought to recover damages for injuries received in an explosion that took place on May 28, 1980 at the Latta-Dillon Grain Market owned and operated by FCX, Inc.

The Evidence

FCX, Inc is a North Carolina corporation that engages in the business of buying, selling and storing grain in bulk quantities as well as operating retail sales centers and fertilizer plants. In May of 1980 it owned and

operated seventeen bulk grain handling facilities in both North and South Carolina. The Latta-Dillon facility consisted of both a retail sales center and a bulk grain market. Each was operated as a separate department of the company, but with a Service Center Manager over the entire facility.

The grain market portion of this facility has a storage capacity of between 350,000 and 400,000 bushels in its bins (A93).[1] The grain is moved in and out of the storage bins by use of grain elevators and a system of spouts and augers. Not all grain purchased or sold

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[1] References are to the Joint Appendix filed with the Court of Appeals.

moves through the elevators and the grain purchased does not always require storage (A38-43).

On May 28, 1980, employees of FCX were preparing for the upcoming oat and wheat season. There had been no active harvest season for several months. On this date, however, FCX purchased and sold 163,057 pounds of grain (A38-43) without the need of storage. In addition the Defendant moved 12,730 pounds of grain into storage and shipped 860 pounds out of storage. (A43)

As part of the preparation for the upcoming season the Service Center Manager asked Doug Godwin, an employee of FCX, to service and fire the grain dryer so it would be available for use(A66,73).

The dryer is used when grain is purchased for storage if the moisture content is too high for the grain to be stored safely without spoilage.(A66) The grain dryer is not in continuous operation as it is a piece of equipment that is used only seasonally.(A78,106) Grain is frequently moved through the facility without making use of the dryer. (A70)

Doug Godwin was manager of the Maintenance Department for FCX and was responsible for the maintenance on all seventeen bulk grain markets in the Carolinas. (A71) He attempted to fire the dryer, but it would not fire and he discovered that the wiring in the panel box had been gnawed by rats. (A73) FCX did not employ any electricians on its

payroll and there was no one employed in the maintenance department qualified to perform electrical repairs. (A32) Smith & Sons electricians were called out to perform the electrical repairs. (A74)

Smith & Sons is an electrical contracting company that provides electrician services to agricultural, residentail and commercial customers in the Latta and Dillon area. The company has provided those services to FCX on many occasions over the years, but had no ongoing contract and no schedule of repairs or other regular service arrangements with FCX. Work was performed by Smith & Sons in response to a call requesting the services, bills were submitted and payment received on a per job basis. FCX

did not exercise any supervisory control over the employees of Smith & Sons and in all respects Smith & Sons operated as an independent contractor in its dealings with FCX. (A17-21)

On May 28, 1980, Carlisle Smith and his sons went to the FCX facility in response to Doug Godwin's call. Smith & Sons worked up into the afternoon repairing wires and replacing controls, but when this was completed the dryer still would not fire.(A29) No employee of Smith & Sons has ever attempted to fire the dryer as their work was limited to installation and replacement of electrical wiring and controls. (81-82)

Craig Smith was employed by his father as an electrician's helper.

He was standing and waiting while his father looked over some diagrams with Doug Godwin. Suddenly there was an explosion behind where Craig was standing and a ball of fire came up from the base of the elevator legs. (A29-30)

All three elevator legs were completely destroyed by the explosion. The grain dryer, however, suffered no damage from the explosion. Without elevator legs to carry the grain up to the storage bins, FCX could not purchase grain until the elevator legs were replaced. It could, however, and did engage in the sale of grain after a make-shift operation was set up to ship grain out. The facility was operating for shipping out within a week and a half of the

explosion. The dryer was not used again until approximately two months after the explosion. (A106-107)

Craig Smith filed suit to recover for his injuries based on contentions that FCX was negligent in the operation, maintenance and construction of its grain handling facility in violation of applicable safety standards, codes and regulations.

The Defendant entered as its Fourth Defense that Craig Smith was a statutory employee within the meaning of S.C. Code § 42-1-400 (1976) and that any action against FCX was barred by S.C. Code § 42-1-540 (1976).

The Rulings Below

A jury trial was held September 6-9, 1983, the Honorable Clyde H. Hamilton presiding. At the close of all evidence cross-motions were made for Directed Verdict by both parties as to the Fourth Defense. The trial court ruled that the Plaintiff was a statutory employee of the Defendant as a matter of law, granted the Defendant's Motion and dismissed the Plaintiff's action by judgment entered September 9, 1983, and the Plaintiff instituted this Appeal.

The Trial Court, though noting it was not binding authority, placed great reliance on the case of Singleton V. J. P. Stevens, 533 F. Supp. 887 (D.S.C. 1982), and found it to be dispositive of

all issues in this case. The Singleton case had been decided by the Honorable William W. Wilkins, Jr. on cross-motions for Summary Judgment filed in that action and Summary Judgment was granted to the Defendant by a decision issued on January 22, 1982--just eleven days prior to the filing of Craig Smith's Complaint against FCX. Aside from any flaws one might perceive in the rationale used by Judge Wilkins in Singleton, this case did not appear to present any impediment to the pursuit of Craig Smith's claim since the two cases were distinguishable on the facts in almost all particulars. The Singleton case represents an erroneous interpretation of State law at the trial level, but it was not

binding authority for determination of this action in September of 1983. The result in Singleton was correct, but the rationale used for determining the matter was erroneous. But, the error has been perpetuated and enlarged in this action by application of the same flawed interpretation of State law to a totally different fact situation leading to an erroneous result as well as the use of an erroneous rationale.

In both Singleton and in the instant appeal, the trial courts attempted to extract a general rule that would answer the question in all cases and developed a criterion whereby the injured worker is deemed a statutory employee of the owner if the work being performed is

"essential" to the function or "necessary" for the operation of the owners trade or business.

This criterion may be very easy to apply since it would appear that the answer would always be the same and the injured worker would always be barred from suing any commercial user of his services especially if he happens to work in any of the repair or maintenance trades. It is difficult to conceive of a trade or business that could stay in business very long if it went around contracting for nonessential work to be performed or had repairs and maintenance work performed on unnecessary equipment. This is a maverick rule, outside the general rules and principles used by the

majority of courts for determining the issue. See, Larson, Workmen's Compensation Law, § 49.12; 99 C.J.S. Workmen's Compensation § 1096. It is also in direct conflict with established South Carolina Supreme Court authority. As stated in Miles v. W. Wa. Pulp & Paper Co., 212 S.C. 424, 48 S.E.2d 26 (1948) "...It may be admitted that pulpwood is a commodity essential to the operation of the defendant's business, but it does not necessarily follow that the work of supplying the mill with pulpwood is a part of the usual business operated by the defendant." 48 S.E.2d at 33. The Miles case has never been overruled and continues to be cited as authority for a variety of holdings Pyett v. Marsh

Plywood Co., 240 S.C. 56, 124 S.E.2d 617 (1962); Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963); Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980).

Therein lies the problem. Language can be plucked from and a citation given to a South Carolina Supreme Court case for a multitude of apparantly conflicting "holdings" depending upon the point the writer wants to illustrate as having been well-established by the South Carolina Supreme Court.

The trial courts in both Singleton and this case can quote dicta about the essential nature of fire protection to the operation of a mill from Boseman v. Pacific Mills, supra, for the announce-

ment of the "essential and necessary" test as determinitive of the issue. But this does not take into account the actual facts present in Boseman, (App. E) the express language of Miles, supra, stating that necessity alone is not enough, or the result obtained in Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E. 2d 101 (1979).

Ample citation can be found for the statement that a worker can be deemed engaged in the trade or business of the owner, despite the fact that the owner may never have performed the same chore with his employees, as shown by the four cases cited for this principle in Singleton 533 F. Supp at 890. But,again, this overlooks the actual facts present in the

the cases cited, the outcome of Wilson v. Duke Power Co., supra, as well as the clear basis of the trial court's ruling that was found to be correct in the appeal of that case. (App. F).

It is just as easy to find four cases that either refer to or quote from Larson, Law of Workman's Compensation, § 49.12 "general rule" that work that is part of the trade or business of an owner is work that is normally performed by his own employees. Adams v. Davison-Paxon Co., supra; Bridges v. Wyandotte Worsted Co., supra; Mack v. R. C. Motor Lines, Inc., supra; Dickerson v. Eastman Kodak Co., 569 F. Supp 1221 (D.S.C 1983).

But all is not as chaotic as it might seem in the body of South Carolina

law on this subject. There has been no case that has reviewed all of the criteria used by the state courts in determining this issue. But a careful analysis of the actual facts present in the South Carolina cases deciding this point (both state and federal, prior to Singleton), a comparison of the facts that apparantly led to different conclusions in seemingly similar cases, and an examination of the results obtained in the cases yields a surprisingly consistent and predictable analytical framework. A pattern emerges from the state cases illustrating that a three part approach to the problem has evolved. Within this framework, operative facts, results and rationale are

harmonized into a consistent body of authority that is dependant for its harmony only on which of the three types of factual patterns the case fits into most easily.

The cases fall into three distinct categories:

1. Cases in which the fact that the owner and the injured worker's direct employer are engaged in the same type of business or exist for the same business purposes is the major factor. Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Parker v.

Williams and Madjanik, Inc., supra.

In these cases, the fact that the owner has never actually performed the work with his own employees, is irrelevant. The nature of the business engaged in provides the unity of trade or business required for a finding that the worker is a statutory employee.

2. Cases in which the degree of shared business identity between the owner and the worker's direct employer and the degree of control exercised by the owner over the direct employer's conduct of his business is the major factor. Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957);

Corollo v. S. S. Kresge Co., 456 F.2d 306 (1972).

These cases do make the point that the owner could have performed the same work through its own existing employees if it had chosen to do so.

3. Cases in which the Defendant's ability to perform the same work with its own employees was the major factor. Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939); Boseman v. Pacific Mills supra (see App. E); Bell v. S.C.E. & G., 234 S.C. 577, 109 S.E.2d 441 (1959); Bridges v. Wyandotte Worsted Co., supra; Mack v. R.C. Motors 365 F. Supp. 416 (D.S.C. 1973).

In all of the cases the Defendant had the capacity and skill within its own labor force to perform the work being done and the subcontractor's employees served only to augment existing labor capacities. Factually, Singleton would fall into this category and, therefore, the result reached in that case was correct.

If the facts of the case do not fall within these easily discernable categories, then the injured worker is not a statutory employee. McDowell v. Stilley Plywood, 41 S.E.2d 872 (1947); Miles v. W. Va. Pulp & Paper Co., supra; Pyett v. March Plywood Co., supra; Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101

(1979). The case at bar does not fit into any of these categories and the ruling of the trial court should properly have been a grant of Summary Judgment in favor of the Plaintiff as to the Fourth Defense raised by FCX.

The existing case law lends itself to the above analysis, but admittedly there is no one case stating this to be the law of South Carolina on this issue. Instead there are a lot of seemingly inconsistent rulings in cases that all continue to be cited as authority on the issue of statutory employment. And with Singleton and the action at bar the federal courts appear to be developing a criterion that is incompatible with most of the state court decisions.

The Workers Compensation Act is a comprehensive statutory and regulatory scheme that is particularly local in character. The federal courts are exposed to this statutory scheme only in determinations of this most difficult question of statutory employment as a bar to litigation of a personal injury claim the Plaintiff would otherwise have every right to pursue in the federal courts. With the confusion apparant in the case law, especially since the District Court's decision in Singleton, it has become apparant that clarification is needed from the South Carolina Supreme Court for determining the appropriate application of this Worker's Compensation statute.

Under South Carolina Supreme Court Rule 46 provision is made and a procedure is established for the Court to answer questions of law certified to it by any federal court. On February 6, 1984, the Appellant filed by mail a Motion to Certify a question of State Law to the South Carolina Supreme Court requesting clarification of the criterion to be used for determination of statutory employment.

On February 9, 1984, the Court of Appeals for the Fourth Circuit affirmed the District Court's decision in Singleton v. J. P. Stevens, 726 F2d 1011 (4th Cir 1984) and the precedent that must now be followed by the federal courts of South Carolina for determining whether

an injured worker is barred from the recovery of damages from a tort-feasor is whether the work being performed at the time of unjury was "essential to the function of the employers continued business, even if the employer may have never performed the same chore with his own employees." 726 F.2d at 1013.

The Appellant's Motion for Certification of this question was deferred until argument on the merits of the appeal. The Court of Appeals issued its decision on October 2, 1984, affirming the trial courts grant of a Directed Verdict to the Defendant and reiterating the criterion adopted in Singleton as controlling on this issue.

Appellant's Motion for Certification

of the question was denied on the basis that the Plaintiff sought and received a federal court's interpretation of state law and a request for certification at this juncture "comes with little grace." Interpreting S. C. Supreme Court Rule 46 as allowing certification when there is no ample precedent to guide the certifying court, the Court of Appeals found there was ample precedent on this question since it had been dealt with frequently by the South Carolina Supreme Court over a period of forty years.

The Court of Appeals also referred to the Plaintiff's contention that the question of statutory employment was a question of fact for the jury to determine under Byrd v. Blue Ridge Electric

Cooperative, 356 U.S. 525 (1958), but found this was not necessary when there is no underlying genuine issue of disputed fact. It is from the Court of Appeals decision that the Plaintiff now appeals in this Petition for Certiorari.

REASONS FOR GRANTING CERTIORARI

The right of access to a court of law for resolution of disputes and redress of wrongs is so fundamental that every citizen is aware of that right without ever reading the Constitution or attending a Civics class. It is so much a part of being an American citizen that knowledge of that right is simply breathed in with the air around us. It takes the special attention of classroom instruction and a study of the law to find out that this right is not absolute and that there are restrictions, conditions and qualifications to that right. But the redress of wrongs is still assumed and any limitations or restrictions are not arbitrarily created, but arise out

of the resolution of conflicting considerations of public policy within the framework of the rights of the citizenry.

The statutory schemes for Workers Compensation Acts enacted across the country represent a massive balancing act of the rights of employers with the needs of injured workers to come up with a scheme that best answers the needs of society at large to have a means of compensating victims of industrial accidents.

The Appellant is not taking issue with the underlying principles that allow a worker to be classified a statutory employee or the exclusive remedy provisions of the Act under which third parties also claim immunity from suit.

But, any statutory scheme that involves the derogation of common law rights must be examined carefully and applied with uniformity and fairness to all who may be affected. The Court of Appeals for the Fourth Circuit has interjected an arbitrariness into this body of law that deprives the citizens of South Carolina of the same right of access to a court of law that is enjoyed by other citizens within the Fourth Circuit. A maverick rule for determining the question of statutory employment has been created in the federal courts for Plaintiffs who bring suit in South Carolina, while the general rule is applied to citizens of the state of Virginia under a virtually identical statutory provision. See

Farish v. Courion Industries Inc., 722 F2d 74, 80 (4th Cir 1983). There is no basis for carving out a different rule for application to South Carolina litigants. In Farish the court cited the general rule as it is found in the language of Larson, Law of Workman's Compensation, § 49.12 as having been quoted with approval by the Virginia Supreme Court. Id. The same language has also been repeatedly quoted with approval by the South Carolina Supreme Court as well, See e.g., Adams v. Davison-Paxon Co., supra; Bridges v. Wyandotte Worsted Co., supra; Mack v. R.C. Motor Lines, Inc., supra.

There was no attempt by the Court of Appeals to determine when this general

rule was operant in the South Carolina case law and under what circumstances the general rule might not apply. Instead, the Court of Appeals announced a rule for deciding the issue in all cases that is not found to be a factor of controlling consideration in any case decided by the South Carolina Supreme Court, and ignored the approving quotation of the general rule found in so many South Carolina cases.

In fairness to the citizens of South Carolina and under general principles of comity between court systems, the Court of Appeals should have made use of the opportunity for consultation with the South Carolina Supreme Court before announcing a rule for determining

the issue of statutory employment that is far outside the general rules developed for construction of such statutes in other courts. If tort-feasors in South Carolina are to be given immunity from accountability for their wrongs by a maverick rule of statutory construction then the announcement of such a deviation from the general rule and its basis should be given to the victims of such tort-feasors by the South Carolina Supreme Court.

The Court of Appeals refused to certify the question for state court clarification apparantly on the basis that the request came far too late. There was no reason for the Appellant to believe that a federal court would

apply any rule for determining the issue that was outside the general rules used in other cases. The general rule had been quoted many times by the federal courts in cases arising in South Carolina and its application had apparantly never been questioned. See e.g. Corollo v. S.S. Kresge Co., supra; Mack v. R.C. Motor Lines, Inc., supra; Wright v. Westvaco Corp., 522 F. Supp. 775 (D.S.C. 1981).

The District Court ruling by Judge Wilkins in Singleton became available shortly after the filing of this action, but it was not binding authority, was factually distinguishable from the case at bar, and, furthermore, did not address itself to a consideration of the general

rule or its rejection in any way. Judge Hamilton referred to both the Singleton decision and the general rule in Dickerson v. Eastman Kodak Co., 569 F. Supp. 1221 (1983) and even quoted the following language from Larson, supra § 49.12 at 9-53, as the test to be used for deciding that case:

> From these cases it will be readily seen that the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business... The test... is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contrac-

tors. 569 F.Supp. 1224.

This case was decided on July 8, 1983, and Judge Hamilton granted summary judgment to the Plaintiff as to the statutory employment defense raised by the Defendant. Sixty days later Judge Hamilton Directed a Verdict in favor of the Defendant in this case based on a finding of fact by the Court that the grain dryer being repaired was essential to the operation of Defendant's business and that under the analysis used by Judge Wilkins in Singleton, the Plaintiff was a statutory employee of the Defendant as a matter of law.

Sometime between July 8, 1983, and September 9, 1983, the test for determining the issue announced by Judge Hamilton

had changed and this was the first indication that the federal courts were considering the essential nature of the work being done to be controlling over any consideration of whether the owner was normally able to perform the work with his own employees. The Appellant's Motion to certify the question to the South Carolina Supreme Court was made just days prior to the Court of Appeals decision affirming the lower court in Singleton. The refusal of Appellants motion on the basis that the Plaintiff chose a federal forum for interpretation of state law overlooks the fact that there was no reason to believe there was a conflict in interpretations at the time this suit was commenced or up until the

Order for Directed Verdict in favor of the Defendant was entered by the trial court. The appeal of this action was well underway and the Motion of Certification of the question had been made before the erroneous interpretation was also adopted by the Court of Appeals in another case. The Appellants request was certainly timely under these circumstances, but even if it had not been the Court of Appeals should have welcomed an opportunity to request clarification from the South Carolina Supreme Court before proceeding with application of an aberrant criterion for determing an issue that is so vital to the rights of the citizens of South Carolina to obtain access to the court for the redress of

wrongs.

The difference between the ruling in Dickerson and in the case at bar illustrates two additional and interrelated areas in which arbitrariness has been interjected into this area of law with approval by the Court of Appeals. First, it illustrates the arbitrariness of attempts to apply the "essential function" test developed by the federal courts. And, secondly, it is a clear illustration of the consequences of the refusal to follow the ruling of this court in Byrd v. Blue Ridge Cooperative, supra.

The arbitrariness of the "essential function" test is illustrated by the fact that Judge Hamilton found that the

transportation and delivery of manufactured goods to market was not an "essential function" of the business of manufacturing those goods in Dickerson. Yet the repair of a grain dryer used only seasonally--and even then only when grain was purchased that also needed to be stored and , further, was too wet to be safely stored--was an "essential function" of the continued operation of the business of FCX, Inc.

The anomoly is readily apparant. The manufacturing plant does not manufacture goods just for the fun of it--the owners of that plant no doubt consider it "essential" to get their goods to market. Judge Hamilton, however, found this not to be an essential

function of the operation of the owners business, even though Carolina Eastman did employ truck drivers. Judge Hamilton pointed out that he based his decision on the fact that Carolina Eastman did not operate any over-the-road trucks and that all trucks used in its plant were used for purposes other than transportation of goods to customers. In the case at bar, however, the fact that FCX had no electricians in its employ, could not and did not perform electrical repairs with its own personnel or equipment carried no weight whatsoever. Where is the predictability of outcome that is supposed to be the purpose of formulation by the courts of

general rules and "tests" that are determanitive of an issue?

It is apparant that conclusions may differ in the minds of reasonable men as to what activity does or does not constitute an "essential function" of the continued operation of a business. This Court ruled in Byrd V. Blueridge Electric Cooperative, supra, a 1958 case arising out of the District Court of South Carolina, that the question of whether a Plaintiff was a statutory employee of the Defendant was a question of fact that required submission to the jury in a federal court, despite the fact that this was a judge-made determination in the state courts. This ruling was again reiterated by this court in

Mageneau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959).

In Walker v. United States Gypsum Co., 270 F.2d 857 (4th Cir 1959) Judge Haynesworth took issue with the rational used in these cases, but goes on to state:

> ...We need not now consider, however, the broad implications of Byrd and Mageneau. We are twice told that this particular fact, if controverted, is to be submitted to a jury in a federal court, though it be classified and treated by the state as it is in South Carolina and Pennsylvania. Id. at 860

Judge Haynesworth does state further, however, that the issue may be passed on

as any other issue before the Court if there is no issue of fact genuinely in dispute. It would appear that cases decided in South Carolina since the publication of Walker V. United States Gypsum Co. have never had another issue of fact genuinely in dispute. It has become the common practice to submit this issue for determination by Motion for Summary Judgment (See App B District Court opinion at p.p. 12a-13a).

Despite the fact that the Plaintiff was entitled to have the evidence along with all the reasonable inferences that can be drawn therefrom viewed in his favor when the Defendant's Motion for Directed Verdict was under consideration, both the trial court and the Court of

Appeals found there was no issue of fact that was genuinely in dispute. Despite the fact that the Defendant transacted business involving the purchases and sale of 176,677 pounds of grain on May 28, 1981 before the explosion occured, without thought for or need of the grain dryer, despite the fact that the grain dryer was used only seasonally, dry grain was frequently received, and no attempt to continue with the repair of the dryer was made for two months after the grain market was operational by make-shift methods, neither the trial Court nor the Court of Appeals could find any evidence or inferences to be drawn from the evidence that could lead reasonable minds to reach different conclusions as

to whether the grain dryer was so essential to the operation of the Defendant's business that it rendered Craig Smith a statutory employee of the Defendant.

It would appear that the Court of Appeals for the Fourth Circuit does not agree with the ruling of Byrd and Mageneau and has, in effect, refused to follow this decision by simply finding no genuinely disputed issue of fact. If the Fourth Circuit has in fact determined that the continued viability of Byrd and Mageneau is questionable, it would serve justice more graciously to say so outright--especially in the face of an evidentiary record such as this one--rather then dispose of the issue with the following:

> Without regard to the possibility that South Carolina has made the question one of jurisdictional fact, the question of the applicability of the statute is one for the court when there is no underlying genuine issue of disputed fact. (citation to Walker)

A right granted to the Plaintiff and other citizens by the United States Supreme Court in Byrd is of little value if the District Courts and the Court of Appeals will not safeguard or enforce that right.

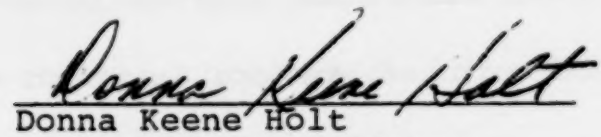
CONCLUSION

Craig Smith is entitled to recover full compensation for his injuries from a Defendant whose gross negligence

caused him injury and the errors committed by the District Court and the Court of Appeals have deprived him of that right. But, moreover, the correction of these erroneous rulings is needed for all injured workers in South Carolina who are also being deprived of the right of access to the federal courts to litigate the issues or who will otherwise be affected if the ruling of the Court of Appeals is allowed to stand. Furthermore, if the rights given to the Plaintiff under Byrd are to be real, the courts within the Fourth Circuit need to be reminded that they are required to follow the decisions of this Court.

WHEREFORE, the Petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,



Donna Keene Holt
Counsel for Petitioner
2214 Devine Street
Columbia, S. C. 29205
(803) 252-7530

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LUTHER CRAIG SMITH v. FCX, INC.
No. 83-1993
October 2, 1984

HAYNSWORTH, Senior Circuit Judge:

Smith brought this action in the diversity jurisdiction for personal injuries he sustained at a grain storage facility owned by the defendant. Plaintiff's employer, Smith and Sons, had been engaged to do electrical work on a grain dryer at that facility, and the district court held that Smith was a "statutory employee" of FCX within the meaning of the South Carolina Workmen's Compensation Act. S. C. Code § 42-1-10, et. seq. We agree.

I.

FCX, a North Carolina corporation, owns and operates a number of retail service centers and grain markets. One of

them is located between Latta and Dillon, South Carolina. Much of the grain is purchased for storage, and the Latta-Dillon plant had a storage capacity of from 350,000 to 400,000 bushels. Before the grain is stored, however, it frequently is necessary to reduce the moisture content of the grain in order to prevent the formation of mold and spoilage. For that purpose, there is a special drying bin into which fresh grain is put and through which hot, drying air is forced.

In the late spring of 1980, the maintenance manager of FCX called upon Smith and Sons, an independent electrical contractor, to replace the electrical wiring and sensors of the dryer at the Latta-Dillon plant. FCX could perform no such electrical work through its own

employees, for it employed no electricians, but it had engaged Smith and Sons to do such work on many occasions.

While engaged in the repair of the dryer and the dryer's electrical system, the Plaintiff, an employee of Smith and Sons, was injured in an explosion.

II.

This court was recently confronted with precisely this same question. In Singleton v. J. P. Stevens & Co., 726 F.2d 1011 (4th Cir. 1984), an employee of an independent electrical contractor, who was injured while repairing electrical lines in one of the defendant's plants, was held to have been the statutory employee of the defendant. Hence, we need not here recanvas all that was said in Singleton.

South Carolina's Workmen's Compen-

sation Act created an exclusive statutory remedy for the compensation of injured employees of a covered employer. At the same time, South Carolina abolished the jurisdiction of its courts to entertain common law claims of such employees. In order to foreclose the subcontracting of work to uncovered employees of other employers, the statutory definition of employee includes any person while he is performing work as a part of the owner's trade, business, or occupation.

The South Carolina Supreme Court has held that a person is performing the trade, business or occupation of an owner if he is engaged in work that is essential to the function of the employer's business, even if the employer never performed that particular work with its own employees. See, e.g., Boseman

v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940), Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101, 104 (1979). In Singleton we tracked the decisions of the South Carolina Supreme Court.

III.

Citing Byrd v. Blue Ridge Electric Cooperative, 356 U. S. 525 (1958), the plaintiff contends that it, nevertheless, was inappropriate to direct a verdict for the defendant since, under Byrd, the question is generally one for the jury in a federal court. This contention was sufficiently addressed in Singleton. Without regard to the possibility that South Carolina has made the question one of jurisdictional fact, the question of the applicability of the statute is one for the court when there is no underlying genuine issue of disputed fact. Walker v. United

States Gypsum Co., 270 F.2d 857 (4th Cir. 1959).

IV.

The plaintiff sought and received a federal court's interpretation of state law. He now urges that we certify the question to the Supreme Court of South Carolina. At this juncture, the question comes with little grace. See Cantrell v. University of Massachusetts, 551 F.2d 879, 880 (1st Cir. 1977).

The Supreme Court of South Carolina's Rule 46 provides for certification by a federal court of questions of law when there is no ample precedent to guide the certifying court as to the answer the state court would provide. There is ample state precedent on this question. The Supreme Court of South Carolina has dealt with some frequency with the question

over a period of forty years. See, e.g., Boseman v. Pacific Mills, 193 S.E. 479, 8 S.E.2d 878 (1940); Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1977); Bell v. South Carolina Electric and Gas, 234 S.E. 577, 109 S.E.2d 441 (1959); Bridges v. Wyandotte Worsted Co., 243 S.C.1, 132 S.E.2d 18 (1963); Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980).

V.

Finding no error, we affirm.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT OF SOUTH CAROLINA, Florence Division

LUTHER CRAIG SMITH v. FCX, INC.
CA 82-0212-15
September 9, 1983

The Court: Of course, at this stage of the trial, with all of the testimony in by the Plaintiff and the Defendant, and the rebuttal, the matter is before the Court on cross-motions for directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, as to the issue of the statutory employee status of the Plaintiff.

The Plaintiff has moved for a directed verdict on the statutory employee defense as asserted by the Defendant, and the Defendant has moved for a directed verdict in its favor as to the availability of this defense, based on what it contends are the undisputed and uncontroverted issues of fact in this

in this case, the Defendant contending that the Plaintiff is a statutory employee under Section 42-1-400 of the South Carolina Code of Laws of 1976, and that in the status of such a statutory employee, his exclusive remedy is under the South Carolina Workmen's Compensation Act.

If the Plaintiff's exclusive remedy is under the South Carolina Workmen's Compensation Act, then, of course, this instant action at common law would be barred pursuant to Section 42-1-540 of the South Carolina Code, and this Court would be without jurisdiction to entertain the common law action.

Now, the same issue viewed another way would be presented by asking whether the Plaintiff Luther Craig Smith would be entitled to Workmen's Compensa-

tion benefits from F.C.X. had his father or Smith and Sons not carried workmen's compensation. If the answer to that question is in the affirmative, then Mr. Smith, the Plaintiff in this case, may not also sue at common law.

Now, as recently set forth by Judge Wilkins in the 1982 decision of Singleton vs. J.P. Stevens and Company, Inc., 533 F. Supp 887, a 1982 decision quoting from page 889: "While this result may seem harsh in this or any particular given case, the overall benefits to those injured during their employment is substantial."

The statutory employee statute, a part of the South Carolina Code codified at Section 42-1-400 provides in pertinent part, "When any person referred to as an owner undertakes to per-

form or execute any work which is a part of his trade, business or occupation, and contracts with any other person referred to as a subcontractor, for the execution or performance by or under such contract of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workmen's compensation under this title which he should be liable to pay, if the workman had been immediately employed by him."

Now, the Plaintiff contends and the Court agrees with such a contention that the question of whether a person is executing a work which is a part of a company's trade, business or occupation is often one of fact for the jury, citing the case of Byrd vs. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525; 78 Supreme Court 893; 2 Law-

yers Edition 2d 953, a 1958 decision, and the closely followed--in terms of time--decision of Magenau vs. Aetna Freight Line, 360 U.S. 273, also a 1959 decision.

However, Byrd does not require the submission of the question of employment status to the jury if there is no genuinely disputed issue of fact.

In the case of Walker vs. United States Gypsum Company, 270 F. 2d 857, at page 860 and 861, a Fourth Circuit decision of 1959, the Fourth Circuit Court of Appeals stated that, "The matter of employment status and whether jurisdiction lies with the Industrial Commission or with the Courts is a question peculiarly appropriate for Summary Judgment when there is no genuinely disputed issue of fact. The parties should not

be put to a long and expensive trial only to have the Court discover at the end that the case should have been brought in another tribunal, nor should the parties and public suffer delay and dislocation which necessarily follow if crowded jury trial dockets are burdened with cases in which there is no real triable issue. Rule 56, Federal Rules of Civil Procedure, is designed to ensure that they need not."

Of course, that was not employed in this case. The Motion, as I recall it, for Summary Judgment, was--either Motion for Summary Judgment or Motion to Strike the Statutory Employee Defense was made by the Plaintiff. I don't believe the Defendant made the Motion for Summary Judgment, did it?

Mr. Orr: That's correct,

your Honor.

The Court: Now, likewise, under the standard for directed verdict which the Court now has before it, the Court may determine the issue of employment status when there are no controverted issues of fact upon which reasonable men could differ.

I refer you to Moore's Federal Practice, Second Edition, 1980, Section 50.02 (1). Also the case of Brady vs. Southern Railway Company, 320 U.S. 476; 64 Supreme Court 232; 88 Lawyers Edition 239. Also, Pogue vs. Retail Credit Company, 453 F. 2d 336, a Fourth Circuit decision of 1972.

In the Brady case, the Court announced the standard in the following terms: "When the evidence is such that without weighing the credibility of the

witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by a non-suit, directed verdict or otherwise in accordance with the applicable practice, without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims." 320 U.S. at page 479, 480.

Now, as viewed by the Court, the undisputed facts in this case can be summarized as follows:

In the latter part of May of 1980, in particular on May 28, 1980, the F.C.X. employees at the request of Mr. Joseph Johnson, the Manager of the F.C.X. Latta-Dillon facility, or grain market, were performing maintenance and repair

work on the grain handling equipment, at the Latta-Dillon facility, in preparation for the upcoming harvest season for oats and wheat.

Mr. Walter Douglas Godwin, the manager of the Maintenance Department for F.C.X. in North Carolina and South Carolina was in charge of this work, in particular the inspection and firing of the grain dryer, to make certain it was in proper operating condition. When Mr. Godwin discovered that the wiring in the panel box had been chewed by rats, he called Smith and Sons Electricians to replace the wires.

Carlisle Smith and his two sons, Victor and Luther Craig, the Plaintiff in this action, arrived around 9:30 or 10:00 o'clock in the morning of May 28, 1980.

In the course of their repair work, the Smiths replaced some wires in the panel box, certain wiring in the dryer and replaced a high limit sensor on the inside of the grain dryer. Following this repair work, Mr. Godwin, working in consultation if not concert with the Smiths, in particular, Carlisle Smith, fired or started the grain dryer, probably twice, in the afternoon, by his testimony, only to find that it was not operating properly.

In the course of firing the gas operated grain dryer, it was not uncommon to detect or smell gas. When it was observed that the grain dryer was not properly operating following the initial repairs by Smith and Sons, Carlisle Smith and Mr. Godwin consulted the drawings or schematic diagrams for the

grain dryer in an effort to gain information as to the probable cause of the trouble. It was after some thirty minutes of studying these diagrams that the explosion occurred on May 28, 1980.

Now, Smith and Sons had done work for F.C.X. in general at other locations, and in particular, at the F.C.X. Latta-Dillon facility many times since 1976 or 1977. There was no standing purchase order or contract for any repair or maintenance services. Work was performed on a service call basis, with routine billing for time and materials on a per job basis.

F.C.X. did not have electrician employees, but it did have a maintenance crew under the supervision of Mr. Godwin, the F.C.X. Maintenance Manager for some 17 locations in the states

of North and South Carolina. As the Maintenance Manager, one of Mr. Godwin's responsibilities was to keep the F.C.X. grain facilities in operating condition.

On the day in question, that is, May 28, 1980, for a time, Carlisle Smith left the F.C.X. facility at Latta-Dillon to check on another job. His sons remained on the job, mounting controls in the dryer and making certain electrical connections incidental to the work they were performing.

Now, pursuant to the statute, that is, Section 42-1-400 and the cases that interpret it, in order for the Plaintiff, Mr. Smith in this case, to elude the statutory bar of the Workmen's Compensation Law, he must not be performing or executing any work which is part of the trade, business or occupation of

F.C.X.

Now, in considering that and considering the essential element of the grain dryer to the operation of the grain market at Latta-Dillon, the testimony is --the uncontroverted testimony is that without the grain dryer F.C.X. at Latta-Dillon could not purchase any wet or damp grain. The testimony further was that rarely, but nevertheless on occasions it was necessary to redry grain stored within the storage bins.

Mr. Warlick and Mr. Johnson, the Service Manager at F.C.X. Latta-Dillon both testified that the grain dryer was essential to F.C.X.'s Latta-Dillon operation, to control the grain moisture content. Mr. Johnson specifically testified that it's essential to store corn at a moisture level less than

13 percent in order to retard the growth of aflatoxin, a fungus which in higher amounts can be poisonous to livestock.

Additionally, both Messrs. Warlick and Johnson asserted that grain drying was also often necessary to prevent spoilage, and the Defendant could not otherwise, in the absence of a dryer, purchase grain.

Granted that they could continue with their shipping out operations, but I can readily see that it would take long if a farmer arrived at the F.C.X. facility with a load of grain to sell and it was checked and they told him that, well, they couldn't buy it because the gas dryer was out and it was too wet, that rather than go to the trouble of going to this location to only learn that he couldn't sell his grain there, the

farmer would, of course, go to a competitor's location, and I think there was testimony that Purina had a grain facility in the Latta vicinity, and the farmer would normally go there so as to avoid the inconvenience and loss of time of going to F.C.X. Latta-Dillon, only to be told that his grain was wet and they didn't have a dryer, and therefore they couldn't purchase it.

Now, Mr. Godwin testified that a larger capacity dryer was installed in 1978 at the Latta-Dillon location because the first dryer wasn't large enough to handle the volume of purchases that went through the Latta-Dillon facility.

Further, as to the essential nature of the grain dryer, the testimony revealed that while there were one or two F.C.X. grain facilities or markets which

did not have dryers, those had a substantially smaller capacity than the Latta-Dillon location, and by way of illustration, Mr. Godwin asserted that the F.C.X. grain facility at Conway which had no grain dryer had a capacity of some 40,000 bushels, while the Latta-Dillon location or facility had a capacity of some 350,000 to 400,000 bushels of grain.

Now, in reviewing the South Carolina cases interpreting this Code Section 42-1-400, most of which if not all of which have been reviewed by counsel in their arguments, with, I might add, entirely different conclusions and interpretations, this Court first turns to perhaps the most cited case of Marchbanks vs. Duke Power Company, 190 S.C. 336; 2 S.E. 2d 825, a 1939 decision of the South Carolina Supreme Court.

In this case, the Plaintiff, as has been discussed here, was an employee of a paint contractor hired to paint the Defendant's utility poles. The Plaintiff was injured in the process of performing this work and brought a negligence action against the Defendant Duke Power Company.

The South Carolina Supreme Court held that the Plaintiff was a statutory employee of the Defendant Duke Power Company and therefore, workmen's compensation was the exclusive remedy, and that this third party action was barred.

Now, another case which has been widely discussed, also interpreting Code Section 42-1-400, is the case of Boseman vs. Pacific Mills, 193 S.C. 479; 8 S.E. 2d 878, a 1940 decision of the South Carolina Supreme Court in this

area.

The Plaintiff's decedent was employed by a painting contractor hired to paint the Defendant's water tank, even though the contract between the Defendant Pacific Mills and the paint contractor provided that the relationship was one of an independent contractor, the South Carolina Supreme Court held that the decedent was a statutory employee and was entitled to workmen's compensation benefits. The Court noted that "the very nature of the work done by the mill, that of manufacture of cotton into cloth, specially required the best of protection against fires. Hence, this tank was particularly necessary and essential to the operation and carrying on of the business of the mill. It therefore follows that the painting of the tank was

such a part of the trade, business or occupation of Pacific Mills as to constitute Martin a subcontractor and thus render the mill liable to the beneficiary of Boseman for the payment of compensation." 8 S.E. 2d page 880.

Now, if in that case, which placed a great emphasis, and in the decision, there is lesser emphasis placed on the fact that water might be used in the manufacturing process, that case placing such great emphasis on the availability of water for fire protection would constitute that tank an essential part of the business of Pacific Mills, I have extreme difficulty in concluding how the grain dryer in this case would not be an essential piece of equipment to F.C.X.'s grain handling business at Latta-Dillon, where this piece of equipment, the gas

dryer, is actually used in the operations of the grain handling facilities as opposed to use as some emergency measure such as a water tank containing water would in case of a fire.

Now, this broad interpretation of the Code Section was once again followed in the case of Adams vs. Davison-Paxon Company, 220 S.C. 532; 96 S.E. 2d 56[illegible], a 1957 decision of the South Carolina Supreme Court.

In that case, the Court noted that whether one was a statutory employee was an issue of jurisdiction of the South Carolina Industrial Commission, and any doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion. Again, the Supreme Court has spoken.

Third party liability actions

have also been held to be barred by Code Section 42-1-400 in these cases: Bell vs. South Carolina Electric and Gas Company, 234 S.C. 577; 109 S.E. 2d 441, a 1959 decision. Bridges vs. Wyandotte Worsted Company, 243 S.C. 1; 132 S.E. 2d 18, a 1963 decision. And Parker vs. Williams and Madjanik, Inc., 267 S.E. 2d 524, a 1980 decision.

For evidence that these interpretations have been followed by the Fourth Circuit Court of Appeals, I refer you to the case of Blue Ridge Electric Cooperative vs. Byrd, 238 F. 2d, a Fourth Circuit decision of 1956 which was reversed on other grounds in the Supreme Court at 257 U.S. 525. Also, the Fourth Circuit decision of MacMullen vs. South Carolina Electric and Gas Company, 312 F. 2d 662, a Fourth Circuit decision of

1963.

Now, the most recent summary and review of this issue of statutory employee is found in the District Court decision by Judge Wilkins of Singleton vs. J.P. Stevens and Company, Inc., 533 F. Supp. 887, a 1982 decision. And as I, as Judge Wilkins noted there, "The South Carolina Supreme Court since 1939 has consistently held that a person is performing the trade, business or occupation of the employer if the person contracts with the owner to perform a duty which is essential to the function of the owner's continued business, despite the fact that the owner may never have performed the same chore with his own employees." That's found on page 890 of that decision.

Paraphrasing that decision as

I think it applies to this case, even though I recognize that the decision of a fellow district judge is not binding on this Court, nevertheless I find Judge Wilkins' decision quite persuasive.

Paraphrasing that decision, as it starts on page 891, as pointed out in Boseman as well as in the Adams vs. Davison-Paxon Company case, and the other cases cited therein, it is of no moment that F.C.X. did not directly hire its own electricians to perform the repair work in question. While it may have required some skill, some basic skill as an electrician, I don't think that there's any serious question that the repair work under consideration here, as done by Smith and Sons, was anything but routine. And I do find that the continued maintenance and repair of the gas-fed grain

dryer was absolutely essential to the continued operation of the F.C.X. grain facility at Latta-Dillon.

Going on quoting from that decision, the later decision of Bridges vs. Wyandotte Worsted Company, which has already been cited by the Court, further reinforces the view taken by the South Carolina Supreme Court. Bridges, an employee of Collins Electric Company, was brought into the Defendant's textile plant to replace an electrical line. The lines had been replaced on previous occasions and were customarily maintained by a qualified crew regularly employed by the Defendant. However, because the regular employees of the Defendant had put in an excessive amount of overtime, and because the work was to be done on Sunday when the plant was not operating,

the Defendant contracted with an outside electrical company to make the needed replacements on its transmission lines. The maintenance and repair of this electrical system was part of the work done by the Defendant in order to carry on its business of manufacturing woolen goods. While working on the electrical line, Bridges sustained injuries from electrical shock. He was paid compensation by the workmen's compensation carrier of Collins. The lower Court dismissed Bridges' common law action against the Defendant on the ground that the Court was without jurisdiction since Bridges sole and exclusive remedy was under the Workmen's Compensation Law. The South Carolina Supreme Court affirmed.

"Similarly, in the present action, an electrician was regularly

employed by Stevens to maintain and replace small electrical runs within the plant. While he was qualified to repair the lines in question, he did not do so because of the increased manpower necessary to physically handle the larger cables."

And in conclusion, the rationale of the decisions reviewed by this Court, when compared with the undisputed operative facts in this case leads me to the considered conclusion that the Plaintiff in this case, Mr. Smith, was performing part of the trade, business or occupation of F.C.X. at the time of his accident on May 28, 1980.

I therefore conclude that Mr. Smith, the Plaintiff, is a statutory employee of F.C.X., and therefore this common law action is barred in as much

as his exclusive remedies are under the Workmen's Compensation Laws of the State of South Carolina, leaving this Court without jurisdiction.

Based on the foregoing reasoning and interpretation of what the Court finds to be the undisputed facts and the cited authorities, the Court concludes that the Plaintiff's Motion for Directed Verdict as to the statutory employee defense asserted by the Defendant should be and is hereby denied. On the other hand, for the same reasons, the Defendant's Motion for Directed Verdict as to its defense of statutory employee is hereby granted, and the common law action of the Plaintiff, Luther Craig Smith against the Defendant F.C.X., is hereby dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LUTHER CRAIG SMITH V. FCX, INC.
No. 83-1993
November 23, 1984

Upon consideration of the petition for rehearing, no active judge having requested a poll of the court on the suggestion for rehearing en banc, and with the concurrence of Judge Murnaghan and Judge Sprouse,

IT IS ORDERED that the petition be, and it is hereby, denied.

Clement F. Haynesworth, Jr.
Senior Circuit Judge

APPENDIX D
STATUTES INVOLVED

§ 42-1-400. Liability of owner to workmen of subcontractor.

When any person, in this section and 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he

would have been liable to pay if the workman had been immediately employed by him.

§ 42-1-540. Employee's rights and remedies under Title exclude all others against employer.

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of

such injury, loss of service or death.

Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

APPENDIX E
FACTS OF RECORD IN BOSEMAN V. PACIFIC MILLS

The record on appeal in the Boseman case reveals that more facts were present in the case to support coverage than were elaborated on by the Court although some facts were mentioned indicating the involvement of the Mill in the project being worked on. For the convenience of the Court of Appeals, excerpts from that Court record were included as Addendum VI to Appellant's Brief. The following extract of facts contained in the Addendum are referenced to the page number of the Addendum and not to the Court record.

The facility of the Defendant was a mill village, complete with housing for employees and other structures owned by the Defendant in addition to the mill it-

self. (Addendum at p. 10). The Defendant maintained a crew of painters, carpenters and electricians to work on all structures that were part of this complex. (Addendum at p.p. 25-26). The number of painters varied according to the needs of the mill: with the depression on the mill painters went down to one or two and only one fulltime painter was employed at the time of the accident. (Addendum at p.p. 16-17). The mill normally employed a crew of eight to ten painters, and when painting the inside of the mill this would increase to twenty-five or thirty men. (Addendum at p.p. 25-26). Additionally, the work was done under the supervisory inspection of Mr. Pritchard, the head of all maintenance for the mill

complex. (Addendum at p.p. 15-16). Although the Defendant contended that the work being done could not be done by its own employees and required an experienced steeplejack, the record shows that neither of the two surviving workers were steeplejacks, and one was a carpenter by trade with little experience as a painter. (Addendum at p.p. 4, 6).

APPENDIX F

(The full text of the trial Court's Order in Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979), is included as Addendum V in the Appellant's Brief filed with the Court of Appeals. The following is the pertinent excerpt referred to in the text of this Petition.)

There are decisions which buttress a finding that certain ancillary tasks essential to the operation of a business can be classified as part of the trade or occupation. See Marchbanks v. Duke Power Co., supra; Kennedy v. Ocumulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); and Boseman v. Pacific Mills, supra. Construction activity generally can become part of the business if the defendant by its size and nature is ac-

customed to an ongoing program of construction is equipped, both as to skilled manpower and tools, to normally handle such tasks. 1A, Larson's Workmen's Compensation Law, Section 42.19; see also MacMullen v. South Carolina Electric & Gas Company, 312 F.2d 662 (4th Cir. 1983).

The Defendant Byars had done some "finishing" work in regard to improving his property but he had never actually erected a structure. The Defendant Byars was not a professional developer but was only involved in commercially improving his property. While it may be possible in some factual situations to bring construction activities within the umbrella of a developers trade or occupation, such is not the case in the instant case. The Plaintiff was simply not performing tasks

at the time of his accident that the Defendant Byars would have normally accomplished himself or by his employees.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the motions of the Defendants for a new trial and in the alternative for a judgment N.O.V. are denied.

IT IS FURTHER ORDERED that the motion for Summary Judgment by the Defendant Byars on the "statutory employer" immunity is hereby denied and the Plaintiff's motion on this issue is granted.

IT IS SO ORDERED.

Office - Supreme Court, U.S.
FILED
APR 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1610 (2)

IN THE

OCTOBER TERM, 1984

LUTHER CRAIG SMITH,

Petitioner,

VS.

FCX, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Counsel of Record:

Lawrence B. Orr
Post Office Box 130
Florence, S.C. 29503
(803) 662-1418

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940) 8

Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963), 9

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Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979) 8

STATUTORY LAW:

S.C. Code of Laws §42-1-400 7, 8

S.C. Code of Laws §42-1-540 8

COURT RULES:

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STATUTES AND RULES INVOLVED

S.C. Code of Laws §42-1-400: Liability of owner to workmen of subcontractor.

When any person, in this section and §§42-1-410 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S. C. Code of Laws §42-1-540: Employee's

rights and remedies under Title exclude all others against employer.

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Supreme Court Rule 46(1): Rule for Certification of Questions of Law.

Section 1. The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the hightest appellate court or an intermediate appellate court

of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

STATEMENT OF THE CASE

FCX, Inc., is engaged in the business of providing goods and services to farmers in North Carolina and South Carolina. FCX owns and operates retail service centers, grain markets, and fertilizer plants. One service center and grain market is located between Latta and Dillon, South Carolina. The grain market buys grain from local farmers and sells it to various concerns, including other facilities owned and operated by FCX. The grain market also stores grain in on-site bins. The Latta-Dillon FCX grain market has ten (10) bins with a total storage capacity of between three hundred fifty thousand (350,000) and four hundred thousand (400,000) bushels. (App. 64.)[1]

[1] References are to the Joint Appendix filed with the Court of Appeals.

Grain purchases are seasonal. Wheat and oats are harvested and sold by farmers in late spring and early summer. Corn is harvested in late summer and soybeans are harvested after that. Grains, as harvested by farmers, generally have a moisture content greater than is desirable. Grains with moisture content greater than specified levels, depending upon the grains, will spoil in storage. (App. 64.) Of particular concern is corn. As harvested, corn normally has a moisture content of fifteen to twenty-five (15%-25%) percent. If corn is stored with a moisture content greater than thirteen (13%) percent, a mold, aspergilus flavus, will grow. A by-product of this mold is aflatoxin which is highly poisonous to livestock. (App. 99.)

The moisture content of grain is reduced by means of a dryer. This is a special bin into which grain is put and hot air is forced through to dry the grain. Very few farmers have dryers on farms. (App. 65.) If a grain market did not have a dryer, it could not purchase grain with excessive moisture. (App. 66.) FCX owned and operated seventeen (17) grain markets. There was testimony that all but two of the grain markets had dryers. The head of the FCX maintenance department could name only one market which had no dryer, and that market had a storage capacity of only forty thousand (40,000) bushels. (App. 93.) In 1978, FCX found it necessary to install a larger dryer at its Latta-Dillon grain market as the older one could not take care of the wet grain. (App. 72.) While it is

not a frequent occurrence, FCX sometimes finds it necessary to dry corn that is already stored in one of the bins. (App. 100.)

In 1980, FCX had a maintenance department for its grain markets and fertilizer plants. Walter Douglas Godwin was manager of that department. In May of 1980, the manager of the Latta-Dillon FCX service center called Godwin to come to the grain market to service the dryer so that it would be ready for the upcoming wheat and oats season. (App. 66.)

When he arrived, Godwin found that some of the electrical wires and sensors on the dryer needed replacing. As FCX employed no electricians, Godwin called Smith & Sons, a heating, air conditioning, and electrical contractor, to make the electrical repairs. Smith & Sons had done electrical work for

FCX many times before at this facility and other facilities. Smith & Sons was paid on a per job basis. (App. 18.) There was no on-going contract between FCX and Smith & Sons.

Smith & Sons was owned by Carlisle Smith. The Petitioner was employed as an electrician's helper. The electrical wires and sensors on the dryer were replaced and Godwin attempted to light the dryer. When the dryer would not ignite, Godwin and Carlisle Smith began looking at a schematic diagram of the dryer's electrical controls to see if they could determine the problem. (App. 30, 74-75.) While the electrical schematics were being studied an explosion occurred, resulting in injuries to the Petitioner.

ARGUMENT

The South Carolina Worker's Compensation law was enacted in 1936. Its purpose is to provide compensation to employees injured on a job regardless of whether the employer is at fault. As a trade off for the employee having a right to compensation when injured regardless of fault, the compensation law provides that worker's compensation will be the exclusive remedy of the injured worker, and the right to maintain a common law action for negligence against an employer is abolished. S. C. Code of Laws § 42-1-540 (1976); Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980). To further promote the intended purpose of the Worker's Compensation law and to insure that all workers will receive benefits,

provisions such as South Carolina Code of Laws §42-1-400 are included. Under this section, if an owner of property subcontracts out a portion of his trade, business, or occupation and a worker of the subcontractor is injured, the owner is obligated to provide worker's compensation benefits if the subcontractor does not carry worker's compensation insurance. Marchbanks v. Duke Power Company, 190 S.C. 336, 2 S.E.2d 825 (1939). Because the owner has this potential liability for worker's compensation benefits, he is also entitled to the same immunity from common law negligence actions. Parker v. Williams & Madjanik, Inc., supra; Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957).

Since Marchbanks v. Duke Power Company, supra, the South Carolina Supreme

Court has had many occasions to determine the applicability of §§42-1-400 and 42-1-540. These sections have been construed in the context of determining whether a person was a statutory employee and, therefore, entitled to worker's compensation benefits,[2] and in the context of determining whether a person is a statutory employee and thereby barred from maintaining a liability action.[3]

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[2] See, e.g., Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940); Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Miles v. West Virginia Pulp & Paper Co., 212 S.C. 424, 48 S.E.2d 26 (1948); and Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 S.E.2d 617 (1962).

[3] See, e.g., Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939); Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957); Bell v. SCE&G Co., 234 S.C. 577, 109 S.E.2d 441 (1959); Wilson v. Daniel International Corp., 260 S.C. 548, 197 S.E.2d 686 (1973); and Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979).

The South Carolina Supreme Court has recognized that no one formula can be laid down, but each case must be decided upon its own factual basis. Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963).

The Petitioner's first question presented seeks to have the Supreme Court review factual findings of the District Court and the Court of Appeals and the applicability of South Carolina law to those facts. This is not the kind of question which warrants issuance of a writ of certiorari.

Contrary to Petitioner's position, this case does not involve the question whether the citizens of South Carolina are being treated differently from the citizens of Virginia, or any other state, under the same law. At issue is the applicability of the South Carolina Worker's Compensation

law to the facts of this case. The interpretation of another state's law is not at issue. It was the duty of the District Court and the Court of Appeals to decide this diversity case based upon the South Carolina law. How the Court of Appeals may have applied a similar statutory provision of Virginia in another case is irrelevant. In a diversity action, a federal court is bound by the law of a state as interpreted by the highest court of that state. There is no conflict in the way the Fourth Circuit Court of Appeals applied the law in this instance and the way it has been applied by the South Carolina Supreme Court.

The Petitioner argues that a different test for determining statutory

employee status was used here than that used by the District Court in Dickerson v. Eastman Kodak Co., 569 F.Supp. 1221 (D.S.C. 1983). An entirely different factual situation existed in Dickerson. In Dickerson the plaintiff was an employee of a common carrier engaged to transport defendant's goods to customers. All of defendant's trucks were used for purposes other than the transportation of goods to customers. The defendant always used common carriers for this. Under the facts of that case the District Court held that transportation of goods by the common carrier was not a part of the defendant's manufacturing business and the plaintiff was not a statutory employee. Here FCX had a maintenance crew for its bulk grain handling facilities. That crew was performing maintenance on the grain

elevator and dryer when the explosion occurred. Maintenance was a part of the trade, business or occupation of FCX.[4]

As presented in Petitioner's second question, Petitioner is also seeking certiorari because the Court of Appeals did not certify this case to the South Carolina Supreme Court. South Carolina Supreme Court Rule 46, which became effective September 8, 1982, provides that a federal

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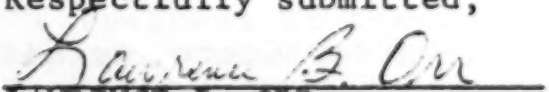
[4] This is analagous to the wood processing cases in which the South Carolina Supreme Court has held that a person cutting and hauling timber to a processor is not an employee for worker's compensation purposes where he merely supplies the timber to the processor. Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 S.E.2d 617 (1962); Miles v. West Virginia Pulp & Paper Co., 212 S.C. 424, 48 S.E.2d 26 (1948). But in instances when the processor also owns the timber and engages the logger merely to cut and transport its timber to the processing plant, the logging operation is considered a part of the business of the owner, and statutory employee status is accorded. Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945).

court may certify to the South Carolina Supreme Court a question of law of South Carolina "as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." S. C. Supreme Court Rule 46(1). At issue here is the application of the South Carolina Worker's Compensation law to the facts of this case. There was ample precedent in the decisions of the South Carolina Supreme Court, since 1939, to determine whether the Petitioner was a statutory employee and barred from maintaining this action. The Fourth Circuit Court of Appeals has applied this law to factual situations on numerous occasions. As there was controlling precedent in the decisions of the South Carolina Supreme Court, certification on this point was unnecessary and unwarranted.

CONCLUSION

The Fourth Circuit Court of Appeals applied the well established law of South Carolina to the facts of this case, and held the Petitioner was barred from maintaining a negligence action against FCX as he was a statutory employee within the meaning of the South Carolina Worker's Compensation law. There is no question of federal law in conflict with the laws of South Carolina. The S. C. Supreme Court has spoken many times in interpreting the applicable statutes and there was no need to certify the case to the South Carolina Supreme Court for interpretation of the state law. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



LAWRENCE B. ORR
Post Office Box 130
Florence, S. C. 29503
(803) 662-1418
Counsel for the Respondent.